.08 grams of a burnt ash, one single seed, all of which was "virtually unrecognizable" as cannabis and that was not tested to be determined to be cannabis. But such an assertion, that Potter found burnt ash and a single seed, untested, and virtually unrecognizable as marijuana was not contained in the search warrant affidavit, and the lower Courts were correct in declining Petitioner's invitation to insert such statements in the affidavit to attempt to rehabilitate it. *Franks* requires only that when the "material that is the subject of the alleged falsity or reckless disregard is set to one side, [if] there remains sufficient content in the warrant affidavit to support a finding of probable cause" a litigant has failed to state their case." (*Franks*, at 171-172) *Franks* does not hold that a Court should add statements that were never in the warrant affidavit. Petitioner cites no cases that hold this, and this Court should decline Petitioners invitation to add statements to an affidavit where the affiant originally chose falsehood. (*Franks v. Delaware* (1978) 438 U.S. 154, 176-177)

Moreover, in his Petition, Petitioner never actually spells out what truthful assertion was disregarded by the lower courts. Instead, Petitioner only generally argues that the false statement regarding the fresh green marijuana leaves and stems from a mature marijuana plant should be redacted to somehow still include an assertion that the virtually unrecognizable single seed and .08 grams of burnt ash that Petitioner claims now to have actually found be included. While Petitioner claims in their argument that Ninth Circuit completely redacted any reference to marijuana "despite the fact that respondents concede that some marijuana stems and leaves were found," this is not supported by the record. Respondents deny placing anything in their trash. Respondents also presented 13 declarations from individuals who declared that they had not placed anything in their trash, where members of the MET had sought search warrants with affidavits claiming to have found "marijuana leaves and stems recently cut from a mature

marijuana plant" and that "the marijuana was fresh green and still moist." which was the identical language Petitioner used in his affidavit. This inability of Petitioner to articulate the truthful assertion actually contained in the affidavit that the lower courts failed to consider reveals the lack of merit to Petitioner's position.

Even if the .08 grams of untested, virtually unrecognizable cannabis was somehow included in the affidavit, the affidavit would still fail. The Magistrate issuing the warrant for probable cause for violation of California law would have been well aware of the requirements of California Supreme Court cases like *People v. Fein* with regards to marijuana. That case flatly held that:

> "It is now well established that evidence of useless traces or residue of narcotic substances do not constitute sufficient evidence to sustain a conviction for possession of narcotics. (*People* v. *Leal*, 64 Cal.2d 504, 511-512 [50 Cal.Rptr. 777, 413 P.2d 665]; *People* v. *Thomas*, 246 Cal.App.2d 104, 111-112 [54 Cal.Rptr. 409]; *People* v. *Johnson*, 5 Cal.App.3d 844, 848 [85 Cal.Rptr. 238].) Although the presence of two burnt marijuana seeds might reasonably suggest that defendant or another occupant of the apartment formerly possessed and used marijuana, that inference would not justify their arrest for present use, possession or sale." (*People v. Fein* (1971) 4 cal.3d. 747, 754)

In addition, Petitioner was a state actor enforcing state law, and charged by the California Constitution to follow state law, even when it conflicts with federal law. (Cal. Const., Article 3, sec. 3.5(c)) Potter was seeking a search warrant based upon probable cause to believe that state law was being violated. Given that the possession or cultivation of cannabis was not

necessarily even illegal in California (Cal. H&S. Code sec. 11362.5), even if the 0.08 grams of burnt material not mentioned in the affidavit was included, probable cause to issue a warrant did not exist. Nowhere does Petitioner address this in his Petition.

Petitioner instead argues that the 8th Circuit case of *U.S. v. Briscoe* (8th Cir. 2003) 317 F.3d 906 and 9th Circuit case of *U.S. v. Celestine* (9th Cir. 2002) 324 F.3d 1095, 1102 support the sufficiency of the affidavit. However, these cases are distinguishable from the instant case. In *Briscoe*, the Court relied specifically upon the fact that what was found in the trash in that search was contraband under Iowa law. (*Briscoe*, at 908) In California, where this search occurred, what was found was not contraband, as it is possible under California law that possession and cultivation of cannabis is legal. (Cite Prop 215; *People v. Mower* (2002) 24 Cal.4th 457). In addition, irrespective of whether the cannabis is possessed legally, under Cal. Health and Safety Code section 11018, the single seed found might not even be defined as marijuana under California law, as only seeds capable of germinating are defined as marijuana. The single seed allegedly found by Potter was not tested to be shown as a cannabis seed capable of germinating, and no such assertion was made by Petitioner in his affidavit.

Similarly, *U.S. v. Celestine* (9th Cir. 2002) 324 F.3d 1095, 1102, a federal criminal case enforcing federal laws, is factually distinguishable. The court held that the combined evidence of residue that tested positive as marijuana on scissors found in the trash, evidence of hydroponics culture, and evidence linking use of the residence to other indoor marijuana growers, in addition to a statement from an informant where no information about the reliability of the informant was included, was sufficient for a search warrant. In the instant case all that was present was the untested burnt .08 grams of residue, misrepresentations regarding the lava rock and irrigation

equipment that did not accurately demonstrate hydroponic culture, black nursery pots with ambiguous implications, and a stale third hand report from an informant that was equivocal, rather than definitive. This is markedly less than what was presented in *Celestine*.

Moreover, Petitioner also fails to distinguish that the affiant in *Celestine* was a DEA agent, enforcing federal laws, which did not allow for the lawful possession or cultivation of marijuana. As set forth above, Petitioner sought his search warrant based upon an affidavit that state law was being violated, which did allow possession of some cannabis, which would have informed the decision of the magistrate in issuing the search warrant.

Thus, even if the affidavit is rehabilitated to include statements not originally contained therein, the 9th Circuit and the District Court were correct in concluding that the stale, third hand, untested informant who claimed that Dr. Baldwin was "possibly growing" cannabis at an unidentified time, and at an unidentified location, who was not accurate in describing Dr. Baldwin's car or the street that he lived on, the ambiguous presence of a lava rock (misrepresented as a "grow rock"), two common gardening pots (misrepresented as 'commonly used in indoor marijuana cultivations'), and 0.08 grams of virtually unrecognizable burnt residue and one seed, all untested, is an insufficient set of facts for a search warrant to be issued.

As the court below applied the correct standards to the facts, correctly excised the misrepresentations by Petitioner, did not leave out any truthful assertions by Petitioner in the search warrant affidavit, and correctly concluded the remaining affidavit was deficient, this Petition must be denied.

II. The Ninth Circuit did not grant undue deference to the white collar profession of Respondent, but rather assessed it as one factor in the totality of the circumstances known to the officer in the analysis required by *Michigan v. Summers*, (1981) 542 U.S. 692.

Contrary to the impression presented by Petitioner, the Ninth Circuit did not give undue deference to Respondent Michael Baldwin's profession, but rather simply included that as one fact it in the analysis of the totality of the circumstances, as required by *Michigan v. Summers*, (1981) 542 U.S. 692.

Moreover, for the first time Petitioner attempts to spin the facts to create the impression that Respondent was not a licensed dentist by making reference to his occupation as a "cover," a "veneer," and simply "secondary." This is an attempt to create the impression that Petitioner believed Respondents to be drug traffickers, which is unsupported by the record and, as the dismissal of all of the criminal charges against Respondents demonstrates, completely untrue. Respondent Baldwin was a practicing dentist, cultivating a small amount of cannabis for medical use under California law, and Petitioner sets forth no facts known or believed by Potter before the search that would lead a reasonable officer to conclude that this occupation was a sham or cover for an illicit business.

Significantly, in Petitioner's third argument, Petitioner recognizes that the officers were entering the residence of persons "suspected of cultivating and /or possessing marijuana" (Pet. Cert., page 17), and not the drug traffickers that Petitioner attempts to paint Respondents as in his second argument. This conforms to the record, that Petitioner had no

information regarding drug trafficking, which was correctly analyzed by the lower Court per *Summers*. Respondent's occupation was known to Petitioner, who possessed no other information that Respondent presented a flight risk or other danger to officers. Thus, in the lower court's analysis, the court did not grant undue deference to Respondent's profession, but simply acknowledged it as a fact admittedly known to Petitioner before the execution of the search warrant. Moreover, the Court did not misstate the rule in *Summers*, and therefore this Petition should not be granted.

III. The Ninth Circuit correctly held that Potter's conduct in executing the search warrant violated clearly established standards of excessive force

Petitioner also seeks qualified immunity for the batteries against Mrs. Chacko in executing the search warrant he authored. At the time of the entry the law has been clearly established that placing a gun to the head of a cooperating and complying female suspect, battering her by forcibly jabbing her in trachea neck 5 to 7 times, while she was wearing only a t-shirt and cottons brief and offering no resistance was excessive force (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005)

Contrary to assertions of Petitioner, no facts suggest now that the residence had not been secured when the batteries by use of the guns occurred. Nor were facts presented in the affidavit, or at any time after that the officers believed that the targets of the search warrant would resist or flee. In addition, contrary to Petitioner's assertion, the conduct of Petitioner did not involve "nudging" Mrs. Chacko, but rather a violent battery against her person by striking her in the trachea multiple times, and then by pressing a gun physically against her head.

Petitioner in arguing that the Court applied *McKenzie* at a too high level of generality, because the batteries in *Mckenzie* were after the suspects were handcuffed and accompanied by taunting comments, not only ignores the facts of this case, but also fails to recognize the differenced between an assault and a battery. The battery of Mrs. Chacko involving the gun occurred as she was complying with the ordered to turn around and lie down on her stomach and place her hands behind her back. A knee was also placed in her back and she was handcuffed. The facts of *McKenzie* and the present case are quite similar, given that in both cases the suspects were subdued and the batteries by use of the guns were a gratuitous escalation of force completely unnecessary under the facts of each case. Contrary to Petitioners' assertion, it is not too high a level of generality to read *Mckenzie* as providing fair notice that the gratuitous escalation of force to include battery by use of a gun physically placed against the head of a complying, non resisting suspect was excessive force.

Petitioner then applies convoluted reasoning to argue that since the officers in Robinson didn't have notice that their conduct was excessive force, even though it was, then Petitioner herein didn't have notice under *McKenzie* that his conduct was excessive force. (*Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007) This completely ignores the long standing and critical distinction between an assault, as occurred in Robinson, and a battery accomplished by placing a gun against the head of a complying, non resisting suspect, as occurred in this case and *McKenzie*.

In addition, the additional battery committed by Potter in poking Mrs. Chacko 5 to 7 times in the neck was excessive under the circumstances, given that she was complying with the officer, was dressed in a t-shirt and cotton briefs, and Petitioner has stated no facts to suggest that such force was objectively reasonable.

Moreover, Petitioner completely fails to address his status as the author of the search warrant affidavit that contained material misrepresentations making the warrant insufficient. As that affidavit was insufficient once purged of the misstatements, and Potter knew of those misstatements, his status in the residence regarding his right to legitimately use force is implicated. Without probable cause to enter and search the residence, all of the force used by Potter is excessive. Potter's misrepresentations in procuring the warrant also implicates any claim for qualified immunity, as no reasonable officer could believe that it is acceptable to procure an illegitimate search warrant through misrepresentation that would allow that officer the legitimate right to exercise force in serving that warrant.

Assuming, arguendo, that Potter had a right to be in the residence and use legitimate force to search and detain, battering a woman dressed only in a t-shirt and underwear by striking her in the trachea repeatedly was excessive force. She offered no resistance, and as was pointed out by the Court in the decision, nothing in the search warrant affidavit or any information provided later by Potter suggests that he had any factual basis to believe that he would encounter any resistance, guns, violence, or people with criminal histories in the residence.

Since *Mckenzie* was decided in 1984, a reasonable officer should know that it has been clearly established that committing a battery by sticking a gun against the head of a complying suspect who is lying face down as instructed by the officer, who has offered no resistance, where there has been no mention of weapons in the search warrant affidavit, is excessive force.

As the court correctly analyzed Petitioner's conduct under the correct standards, this Petition should not be granted.

CONCLUSION

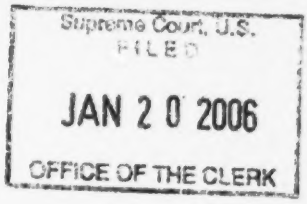
Wherefore, premises considered, Respondents respectfully request that the Petition for Writ of Certiorari filed by Petitioner be denied.

Respectfully submitted,

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No. 05-0586

IN THE

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,

Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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IN THE

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Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

The Ninth Circuit and the Respondents erroneously advocate the wholesale redaction of any reference in an affidavit to marijuana found, where only the description of the marijuana, not its discovery was inaccurate. The Ninth Circuit's overbroad redaction of truthful assertions in an affidavit ignores this Court's requirement that all truthful statements be considered in an affidavit apart from the redacted facts. *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978). The accurate facts contained in the *Baldwin* affidavit are sufficient to merit the issuance of a search warrant.

Further, Respondents' reliance on *People* v. *Fein*, 4 Cal. 3d. 747 (1971), is inappropriate and distinguishable. *Fein* merely held that trace amounts of marijuana did not provide probable cause for an arrest where the arrest was a pretext to conduct a warrantless search. *Id.* at 754-55. Nothing in *Fein*, nor the enactment of California Health and Safety Code section 11362.5, invalidates Petitioner's search warrant. Finally, Respondents repeat the error of the Ninth Circuit in failing to establish that Petitioner was noticed by clearly established authorities that his conduct was excessive.

I. RESPONDENTS ARE UNABLE TO JUSTIFY THE NINTH CIRCUIT'S DEPARTURE FROM THE *FRANKS* RULE REQUIRING CONSIDERATION OF ALL TRUTHFUL STATEMENTS IN A SEARCH WARRANT AFFIDAVIT.

The Ninth Circuit erred in determining that an inaccurate description of the condition of marijuana in a search warrant affidavit requires the redaction of any reference to the existence of marijuana. This Court set forth clear guidelines in *Franks* for construing an affidavit after the "material that is the subject of the alleged falsity or reckless disregard" is "set to one side." *Franks*, 438 U.S. at 171-172. Once all the inaccurate facts are set aside, the truthful and accurate statements remaining in an affidavit cannot be disregarded. *Ibid.* Respondents seek to eliminate any reference to marijuana observed by Petitioner, despite the fact that marijuana in some condition was in fact discovered. (Opp'n to Pet. for Writ of Cert. at 7-11.)

Respondents misstate Petitioner's position as seeking to rewrite the affidavit, rather than simply considering the remaining truthful statements in the affidavit. (Opp'n to Pet. for Writ of Cert. at 7.) Even after redacting all descriptions of the form of marijuana found, the facts remaining in the

affidavit consist of the existence of marijuana in the trash, paraphernalia consistent with marijuana cultivation, and the statement of a confidential informant indicating Respondents were growing marijuana and possessed marijuana growing materials. Respondents artfully dodge the issue of whether Petitioner observed any marijuana in the trash, by instead denying "ever placing any fresh green marijuana cuttings in the trash." (Opp'n to Pet. for Writ of Cert. at 3.)

Respondents have never denied that marijuana in some form was observed in their trash. Rather, Respondent Baldwin admitted in his declaration in support of opposition to a motion for summary judgment that the marijuana discovered in the trash was originally located in his living room and the marijuana consisted of burnt, partially smoked marijuana and unsmokable marijuana stems. (Decl. Michael Baldwin Opp. To Mot. For Summ. J. ¶ 39.) The Ninth Circuit even acknowledged that ".08 grams of burnt marijuana ... are conceded [by Respondents] to have been in the trash." *Baldwin* v. *Placer County*, 418 F.3d 966, 970 (9th Cir. 2005). The Ninth Circuit again recognized Respondents' admission that marijuana was discovered, stating "according to the plaintiffs' evidence, the only marijuana in their trash searched by Potter were blackened bits of marijuana wrapped in a paper towel, the remnants of smoked marijuana." *Baldwin*, 418 F.3d at 968.

Contrary to Respondents' claim, Petitioners are not attempting to rewrite the affidavit or "add statements that were never in the warrant affidavit." (Opp'n to Pet. for Writ of Cert. at 7-8.) The discovery and identification of marijuana in the trash was included in the affidavit. At issue is the description of the marijuana. Instead of maintaining this undisputed fact in the affidavit, the Ninth Circuit misapplied *Franks* by redacting any and all reference to the discovery of marijuana and then asserted Petitioner relied on

"evidence not cited in the warrant." *Baldwin*, 418 F.3d at 971.

A misstated description of narcotics does not invalidate a warrant. In construing *Franks*, the Fourth Circuit upheld truthful assertions regarding the existence of PCP where the affidavit incorrectly described the appearance and condition of the narcotics. *U.S.* v. *Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978) citing *Franks* v. *Delaware*, 438 U.S. 154 (1978). *Crowell* held "the affidavit was not rendered deficient by proof that the affidavit erroneously stated that PCP found in the trash was in the form of white crystalline material rather than, as was the fact, in the form of brown flakes." *Ibid.* Similarly, Petitioner found marijuana, but inaccurately described its appearance and condition in his affidavit.

The discovery of even a small amount of marijuana is independently sufficient to establish probable cause for Petitioner's search warrant. *U.S.* v. *Briscoe*, 317 F.3d 906, 907-908 (8th Cir. 2003). Further, trace amounts of marijuana in combination with the other corroborating evidence establishes probable cause for Petitioner's search warrant. *U.S.* v. *Celestine*, 324 F.3d 1095, 1102 (9th Cir. 2002). Construing the affidavit in light of the existence of some form of marijuana coupled with paraphernalia consistent with marijuana cultivation and the corroborating statement of an informant, the search warrant was clearly valid. Therefore, Review is necessary to correct the Ninth Circuit's departure from *Franks*.

II. RESPONDENTS MISCONSTRUE *PEOPLE* V. *FEIN* IN ERRONEOUSLY ASSERTING THE .08 GRAMS OF PARTIALLY BURNT MARIJUANA LEAVES, A MARIJUANA SEED AND MARIJUANA STEMS COULD NOT SUPPORT PROBABLE CAUSE FOR A SEARCH WARRANT.

In challenging the probable cause for the issuance of the search warrant, Respondents misrepresent the California Supreme Court's holding in *People* v. *Fein*, *supra*, 4 Cal. 3d 747, as precluding the issuance of a search warrant where partially burnt marijuana, a marijuana seed, and marijuana stems are present. Respondents' argument that *Fein* invalidates Petitioner's warrant is specious for several reasons. (Opp'n to Pet. For Writ of Cert. at 9.)

First, *Fein* is factually distinguishable from *Baldwin* as *Fein* involved the warrantless search of a residence where the search was conducted incident to the arrest of the suspect for possession based upon the "presence of two burnt marijuana seeds." *Id.* at 755. The issue examined in *Fein* was whether or not sufficient probable cause existed to effectuate an arrest. *Fein* did not involve the issuance of a search warrant also supported by corroborating including evidence including an informant's statement and paraphernalia consistent with marijuana cultivation.

The *Fein* court noted the different standards in construing the validity of a search warrant as opposed to a warrantless arrest. 4 Cal. 3d at 752. In distinguishing these standards the *Fein* Court explained that "because 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . ' a greater showing of probable cause is required to justify an arrest without a warrant than to justify a search pursuant to a warrant." *Id.* at 752 (citing

People v. *Madden*, 2 Cal. 3d 1017 (1970)). Accordingly, the heightened scrutiny applied in *Fein* is inapplicable to review of the search warrant in *Baldwin*.

Secondly, *Fein* provides no guidance on the requisite quality or quantity of marijuana necessary to establish probable cause for a warrant. While acknowledging "traces or residue" of narcotics could support the issuance of a search warrant, the court held the officer should have obtained a warrant before conducting the search in order to prevent misuse of an arrest for possession as a "pretext to search for evidence." *Id.* at 755-756.

Thirdly, the portions of *Fein* relied upon by Respondents have been overturned by the California Supreme Court. In *People* v. *Palaschak*, 9 Cal. 4th 1236, 1242-1243 (1995) the court reversed itself stating, "although *Fein* and *Sullivan* reached defensible results on their facts, we disapprove the broad dictum in those cases to the effect that evidence of past possession cannot sustain a conviction for present possession." The court explained, "the additional, fortuitous fact that the defendant has consumed or ingested the drug likewise should not preclude a finding of his prior unlawful possession of it." *Ibid.* Accordingly, the evidence of marijuana possession and use discovered by Petitioner in Respondents' trash certainly supports probable cause for the issuance of a search warrant.

Finally, the Ninth Circuit has refused to apply the disapproved *Fein* standard in federal court. *U.S.* v. *Mickens*, 492 F.2d 211, 215 (9th Cir. 1973) (upholding a conspiracy charge for distribution and sales of narcotics based upon trace amounts of evidence). Moreover, the federal courts have consistently endorsed the issuance of search warrants based upon the discovery of small amounts of narcotics. *See U.S.* v. *Greany*, 929 F.2d 523, 525 (9th Cir. 1991); *Briscoe*, 317 F.3d at 907-908; *Celestine*, 324 F.3d at 1102.

In conclusion, Respondents have failed to present any reliable authority to support their contention that the presence of marijuana, even if consisting of burnt leaves, a marijuana seed, and marijuana stems, would not support the issuance of a search warrant. Notwithstanding Respondents attempt to provide possible legitimate uses for the corroborating evidence discovered, the existence of some form of marijuana in combination with paraphernalia consistent with marijuana cultivation and a corroborating statement of the informant provide ample probable cause for the issuance of a warrant. The discovery of marijuana, irrespective of its condition, coupled with the corroborating evidence would clearly lead a reasonable person to conclude there was a fair probability contraband would be found in Respondents' residence.

III. CALIFORNIA HEALTH AND SAFETY CODE SECTION 11362.5 IS IRRELEVANT TO PETITIONER'S SEARCH OF RESPONDENTS' RESIDENCE.

Respondents attempt to challenge the warrant as being in conflict with California Health and Safety Code section 11362.5 is not supported by any authorities. Citing *People* v. *Mower*, 28 Cal. 4th 457 (2002), Respondents seem to challenge the authority of the court to issue a search warrant where marijuana is found in the trash, irrespective of its condition, on the grounds, "it is possible under California law that possession and cultivation of cannabis is legal." (Opp'n to Pet. for Writ of Cert. at 10.) Notwithstanding the enactment of California Health and Safety Code section 11362.5, marijuana is still contraband under California law. Cal. Health & Safety Code § 11357. Moreover, this Court has held federal marijuana laws prevails over those of California. *Gonzales* v. *Raich*, -- U.S. --, 125 S.Ct. 2195, 2212 (2005).

Further, *Mower* was decided four (4) years after the search of Baldwin's residence and therefore is not applicable to this Petition. Additionally, *Mower* merely held a defendant who was prescribed marijuana and was charged with possession and cultivation of marijuana may bring a motion to set aside an indictment prior to trial based upon California Health and Safety Code section 11362.5. *Mower* does not support Respondents' contention that California Health and Safety Code section 11362.5 somehow precludes the issuance of a search warrant in the instant case.

Finally, *Mower* expressly recognized a prescription for marijuana must not be interpreted as immunity from arrest. Likewise, a prescription cannot grant immunity from the court's jurisdiction to issue a search warrant. In fact, *Mower* has no bearing on the inaccuracies in the affidavit, and seems to be cited only to challenge the court's jurisdiction to issue a search warrant. Even if the marijuana discovered in Respondents' trash was prescribed, such circumstances would not preclude issuance of a search warrant, nor limit Petitioner's ability to execute the warrant. *People* v. *Fisher*, 96 Cal. App. 4th 1147, 1149-1151 (2002). A prescription for marijuana does not equate to a license for unregulated and unfettered possession of marijuana. *People* v. *Trippet*, 56 Cal. App. 4th 1532, 1549 (1997). Therefore, *Mower* has no application to this Petition.